IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 13, 2006 Session

AL WATSON, ET AL. v. CITY OF LAVERGNE, TENNESSEE

Appeal from the Chancery Court for Rutherford County
No. 02-5494CV Robert E. Corlew, III, Chancellor

No. M2006-00351-COA-R3-CV - Filed on May 7, 2007

The termination of city employees challenged under a writ of certiorari is affirmed because the city's decision to terminate the at will employees was not arbitrary. The trial court's award of severance benefits to the terminated employees is reversed because a direct cause of action may not be joined with a common law writ of certiorari action.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Affirmed in Part, Reversed in Part

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which WILLIAM B. CAIN and FRANK G. CLEMENT, JR., JJ., joined.

William N. Bates, Nashville, Tennessee, for the appellant, City of LaVergne.

David L. Cooper, Nashville, Tennessee, for the appellees, Al Watson, Milton Bowling, and Diane Ferguson.

OPINION

This matter concerns the appeal of an order wherein the trial court upheld the termination of city employees challenged under a petition for common law writ of certiorari and enforced an agreement the trial court found to exist that gave the terminated employees severance benefits. The petitioners, Al Watson, Milton Bowling, and Diane Ferguson, were employees with the City of LaVergne ("City") Police Department. Al Watson and Milton Bowling were police officers. Ms. Ferguson worked in the police department's administration.

While the petitioners were hired by the City at different times, all three employees went through the same process. All of the petitioners signed a receipt for the City's employee handbook, which included the City's personnel rules and regulations. The receipt stated that the employee "agrees to . . . observe all present and future personnel policies, procedures or rules of my department." The employee handbook provides that all City employees are employed "for an

indefinite term . . . the City may terminate the employment relationship . . . with or without cause or notice. This status can only be altered by a written contract of employment which is specific as to all material terms and is signed by the employee and the Board of Mayor and Aldermen." As part of the application process, the petitioners signed their employment applications which defined the employment relationship as "at will" and stated that the City could discharge them "at any time with or without cause." The application also provided as follows:

> It is further understood that this "at will" employment relationship may not be changed by any written document or by conduct unless such change is specifically acknowledged in writing by the Board of Mayor and Alderman (sic) of the City of LaVergne. I understand, also, that I am required to abide by all rules and regulations of the Employer.

Each of these petitioners participated in efforts to obtain a severance package that guaranteed them six (6) months pay if the Board forced them to resign or terminated them. In effect, the six months severance package would place a condition on their termination and deprive the City of the ability to make an at will termination effective immediately. In Mr. Watson's case, he received a memo signed by the Chief of Police dated September 7, 2001 which stated that if Mr. Watson is forced to resign or is terminated by the Board of Aldermen, then Mr. Watson is entitled the pay and benefits he had been receiving for six months. Mr. Watson signed this memo and, while a seal is missing, there was an attempt to notarize the signatures.

With regard to Mr. Bowling and Ms. Ferguson, they signed Employment Agreements dated January 22, 2001, which likewise gave them severance pay for six (6) months in the event they were terminated or resigned under specific conditions. The City Administrator, Mr. Pickard, also signed the Agreements. Fearful that they would be targets of political retaliation by the Board of Aldermen, the petitioners met with the City Administrator and an attorney.[1] Mr. Pickard testified that he was receiving pressure from the Board of Aldermen to resign and he believed the Board would also move against these employees. The employees testified that they thought the City Administrator had the authority to sign the contracts. Neither the memo nor the agreements were presented to the Board and, therefore, the Board did not approve them or the arrangements attempted in those documents.

The petitioners were terminated by the City on December 10, 2001, for circumventing the Board's policy. Contrary to policy, these attempts to provide the employees severance benefits had not been approved by the Board. The petitioners then filed a grievance contesting their terminations, and the new City Administrator, Mark Moshea, upheld the terminations.

Thereafter, the employees filed a petition for certiorari asking the trial court to review their respective terminations. As relief, petitioners requested reinstatement, back pay, benefits, and costs. By Agreed Order on January 14, 2003, the parties agreed the petitioners' action was under the

[1] While the petitioners and Mr. Pickard met with an attorney, they did not consult with the City's attorney.

common law writ of certiorari. The record of the petitioners' termination hearing was duly filed in the trial court.

The City filed a motion to dismiss the certiorari petition. After review of the record, the trial court remanded the case so the parties could develop the record regarding whether the City acted in an arbitrary and capricious manner in terminating petitioners and whether the severance packages should be enforced.

The trial court upheld the City's decision to terminate the petitioners. In addition, the trial court found that the three petitioners were entitled to the severance benefits. This appeal followed. The petitioners appeal the trial court's failure to set aside their terminations. The City, on the other hand, appeals the award of severance benefits to the petitioners.

I. Appeal Of The Termination Decision

The scope of judicial review under the common law writ of certiorari is narrow and is limited to whether the inferior board or tribunal has exceeded its jurisdiction or acted illegally, arbitrarily, or fraudulently. *Willis v. Tenn. Dep't of Correction*, 113 S.W.3d 706, 712 (Tenn. 2003); *Petition of Gant*, 937 S.W.2d 842, 844-45 (Tenn. 1996) (quoting *McCallen v. City of Memphis*, 786 S.W.2d 633, 638 (Tenn. 1990), citing *Hoover Motor Exp. Co. v. Railroad & Pub. Util. Comm'n.*, 195 Tenn. 593, 604, 261 S.W.2d 233, 238 (1953); *Lewis v. Bedford City Bd. of Zoning Appeals*, 174 S.W.3d 241, 245 (Tenn. Ct. App. 2004).

The scope of judicial review under the common law writ of certiorari also includes a determination of whether the decision maker acted without material evidence to support its decision. *Lafferty v. City of Winchester*, 46 S.W.3d 752, 759 (Tenn. Ct. App. 2001); *Hoover v. Metropolitan Bd. of Housing Appeals*, 936 S.W.2d 950, 954 (Tenn. Ct. App. 1996); *Hall v. Shelby County Retirement Bd.*, 922 S.W. 543, 545 (Tenn. Ct. App. 1995); *Davis Group (M.C.), Inc., v. Metropolitan Gov't of Nashville and Davidson County*, 912 S.W.2d 178, 180 (Tenn. Ct. App. 1995); *Hemontolor v. Wilson County Bd. of Zoning Appeals*, 883 S.W.2d 613, 616 (Tenn. Ct. App. 1994); *Metropolitan Air Research Testing Auth., Inc. v. Metropolitan Gov't of Nashville and Davidson County*, 842 S.W.2d 611, 619 (Tenn. Ct. App. 1992).

Thus, while judicial review under the common law writ does not involve review of the intrinsic correctness of the lower tribunal's decision, *Willis*, 113 S.W.3d at 712; *Robinson v. Traughber*, 13 S.W.3d 361, 364-5 (Tenn. Ct. App. 2000); *Turner v. Board of Paroles*, 993 S.W.2d 78, 81 (Tenn. Ct. App. 1999), and a reviewing court may not reweigh the evidence presented to the board, *Gallatin Hous. Auth. v. City of Gallatin*, 868 S.W.2d 278, 280 (Tenn. Ct. App. 1993); *Hoover v. Metropolitan Bd. of Zoning Appeals*, 924 S.W.2d at 904, a court is required to review the record of the board's proceeding to determine whether there is material evidence to support the board's conclusion.

The petitioners are challenging their terminations from at-will employment. It was not incumbent upon the City to provide any justification for its decision. Consequently, absent an independent violation of the law, such as unlawful discrimination, the City could have terminated them for any reason. On appeal, petitioners do not argue that the City acted illegally or fraudulently. Their only basis for appeal is based on the allegedly arbitrary nature of the City's decision. Since the employment could be terminated for any lawful reason, or for no reason at all, it would be difficult to show arbitrariness.

Mr. Watson argues that he was terminated because he placed an "employment contract" in his personnel file. The record, however, contains no proof that the memorandum he signed or any other agreement was placed in his personnel file. Consequently, Mr. Watson argues that there is no evidence to support his termination.

Mr. Watson is correct that the Order by the City Administrator states that Mr. Watson was terminated "based on discovery of an employment contract in his personnel file." The Separation Notice provided Mr. Watson, however, provides that he was separated because "violation of company policy - severance letter." It is clear from the City Administrator's Order upholding the termination that whether the memo is characterized as a contract and whether it was in his file is irrelevant. He participated in efforts to obtain a severance package without the Board's participation. There is evidence in the record of the severance agreement. Mr. Watson alternatively seeks to enforce it, so he can hardly deny its existence.

All of the petitioners argue that their termination was arbitrary. The City Administrator upheld their terminations because the petitioners attempted to alter their at will employment relationship without Board participation, which violated City policy. The petitioners do not disagree with these findings. Instead, they argue their terminations were arbitrary since other police employees were given fringe benefits in the form of education and uniform contracts. The severance benefits at issue here would obligate the City to pay the employees for six (6) months after termination. Agreements regarding training and potential uniform reimbursement do not interfere with at will employment, while the severance packages herein clearly attempt to limit the Board's authority. Training and uniform reimbursement are not employment terms that impact the nature of at will employment and the period employees are entitled to be paid. We agree with the trial court that treating these types of agreements differently is not arbitrary. Consequently, we do not find the City's decision to terminate petitioners to be arbitrary.

II. SEVERANCE PACKAGE

The City appeals the trial court's enforcement of the severance packages. We have serious reservations about the enforceability of a severance package that admittedly violates City policy and was not approved by the body with authority to make alternative employment arrangements. However, we need not reach that issue because we find that the trial court erred when it considered the severance benefits agreements in this lawsuit.

An appellate cause of action (*i.e.*, a petition for common-law writ of certiorari) cannot be joined with an original cause of action (*i.e.*, a complaint for inverse condemnation). *Winkler v. Tipton County Bd. of Educ.*, 63 S.W.3d 376, 383 (Tenn. Ct. App. 2001); *Goodwin v. Metro. Bd. of Health*, 656 S.W.2d 383, 386-87 (Tenn. Ct. App. 1983) (holding that "[t]he necessity of a separation of appellate review of a matter and trial of another matter ought to be self evident. . . . Like water and oil, the two will not mix.") Where an original action for damages has been joined with a petition for writ of certiorari, the claim for damages should be dismissed at the very outset. *Byram v. City of Brentwood*, 833 S.W.2d 500, 502 (Tenn. Ct. App. 1991); *Goodwin v. Metro Bd. of Health*, 656 S.W.2d at 387.

Seeking to enforce or recover damages for breach of contract is an original action and may not be brought with a petition for certiorari. The trial court should have dismissed the breach of contract claim and not remanded the case for additional evidence on the issue or otherwise considered it. For this reason, the trial court's order enforcing the petitioners' severance packages is reversed.

III. CONCLUSION

The order of the trial court denying the petitioners' request to disturb the City's decision to terminate their employment is affirmed, and the portion of the trial court's order requiring enforcement of the severance package is reversed. Costs of this appeal are taxed to the appellees, Al Watson, Milton Bowling, and Diane Ferguson.

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PATRICIA J. COTTRELL, JUDGE